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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No.

UNITED STATES OF AMERICA,
Respondent

vs.

CHARLES J. PORTER,
Petitioner

On Petition for Writ of Certiorari to the United State Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. This Court should establish a uniform rule under Federal Rules of Evidence, § 806, applicable to hearsay declarants which would protect a defendant's Sixth Amendment rights to confront witnesses against him.

2. When a prosecutor repeatedly violates an order of court limiting cross-examination of a defendant to events testified to by the defendant, is that prosecutorial misconduct allowed to disappear in the figment of harmless error?

3. Where a prosecutor tells a jury in closing that it will either restore the family to its former healthy state or sever the head from the

body of the family and that the people of Western Pennsylvania wait your verdict, and the head of the Mafia is not in court yet, does not such prosecutorial misconduct require a reversal and new trial?

4. Where an indictment is drafted by the United States Attorney's Office and alleges a history of LaCosa Nostra involvement of many individuals who are deceased, is it not error to allow the indictment to go into the jury room to be considered by the jury even with the admonition that it is not evidence and to compound the error by refusing to allow an answer to the indictment by the defendant to also go out to the jury room and not be considered by the jury as evidence?

5. When four co-defendants would give exculpatory evidence if granted use immunity if severed from the trial so that the same jury would not pass upon their guilt or innocence, was Porter not deprived of his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor?

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PARTIES TO THE PROCEEDING

The parties to the proceeding are as set forth in the caption in the court below.

OPINIONS BELOW

The Court of Appeals opinon, unreported, is attached hereto as Appendix 1a-65a. The Court of Appeals has directed that the opinion was "not for publication." Petitioner has not filed a petition for rehearing before the Court of Appeals.

JURISDICTION

This petition is brought pursuant to 28 U.S.C. § 1254(1) to review the order of the Court of Appeals for the Third Circuit dated April 27, 1991. This petition is timely under the provisions of Rule 13.4 of this Court which provides that a petition for writ of certiorari to review a judgment of

the Court of Appeals for the Third Circuit will be timely if filed within ninety days after the entry of judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him; have compulsory process for obtaining Witnesses in his favor . . . "

Federal Rules of Evidence, Rule 806:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statements, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. . . .

STATEMENT OF THE CASE

On April 4, 1990, a Francis Ford Coppola "Godfather" type indictment containing thirty-eight counts and consisting of 116 pages was filed against Porter and fourteen others. Seven were tried jointly. Porter was arrested and subject to pretrial detention. Count I of the indictment was a RICO conspiracy count. Count II was a RICO count incorporating the racketeering acts set forth in Count I. Count III charged a conspiracy to possess and distribute cocaine and marijuana from 1977 to 1990. Counts VI through XVII charged the substantive violations of illegal distribution of cocaine. The jury found Porter not guilty as to Count XIII but guilty as to the remaining substantive counts. Counts XXIII and XXIV charged currency

structuring and Counts XXVIII, XXIX and XXX charged false income tax returns. Count XXXVI charged Porter with counseling a witness in preparing false tax returns and Count XXXVIII was a conspiracy to defraud the I.R.S. relating to the returns filed with an individual named Viola (who in a subsequent trial was acquitted of the charges.)

Porter was sentenced to 336 months imprisonment on each of Counts I, II and III; terms of 60 months on each of Counts XXIII and XXIV; a term of 36 months at Count XXX; and a term of 60 months at Count XXXVIII, all to be served concurrently. The imposition of a 28-year sentence on a man 58 years of age with the very limited time off for good behavior is in effect a life sentence. A life sentence should certainly be reviewed far more in depth

than accorded this defendant by the Court of Appeals for the Third Circuit.

The United States Attorney's Office drafting the indictment chose to go back to 1967 in the allegations in the indictment so that the court would then allow the uncorroborated hearsay testimony of 13 deceased declarants over a 25-year period; hearsay from witnesses not proved to be co-conspirators; and to impose the doctrine of judicial economy as outweighing the subtantive rights of the defendants to a fair trial by granting severances. Since the defendants were in pretrial detention, they were brought into the courthouse daily in leg irons and manacles under heavy armed guard. The guns and guards could be seen by jurors but counsel has been enjoined from interviewing jurors to ascertain what, if any, prejudice resulted.

In this charged atmosphere, Porter through counsel attempted to secure a fair trial. A motion in limine was filed on behalf of Porter and granted by the court which allowed Porter to take the stand and limit his exposure on cross-examination to those specific events testified to on direct examination. As stated, the indictment playing on the common conceptions of words such as "La Cosa Nostra", the "mob", the organized crime family; alleged heads of the Pittsburgh La Cosa Nostra such as Mike Genovese, John LaRocca, Joseph Sica and others, was allowed to go out with the jury during their deliberations. The prosecutorial misconduct in this case is glaringly evident from the cross-examination of Porter when he was asked whether his accountant prepared tax returns for Michael Genovese. Michael Genovese is

identified in the indictment as the head of the Pittsburgh La Cosa Nostra. Objection to the question was sustained but the harm was already done. Despite the court's rulings, the prosecutor continued to ask Porter about relationships with other persons named in the indictment and specifically whether he knew John LaRocca, who was also identified in the indictment as the head of the Pittsburgh La Cosa Nostra. Objection to the question was sustained. Questions regarding the witness' activities with Genovese, LaRocca, Volpe and Kelly Mannarino were all asked by the prosecutor and objections were sustained. To finally administer a coup de grace to a fair trial, the prosecutor when closing to the jury argued:

> So these people talk, and they cooperate, and they tell us what they know, and cases like this are brought. <u>What happens next depends on you.</u>

> The head of this organization is not in court yet.

The argument was objected to and the objection was overruled so the prosecutor, having been blessed by the ruling of the trial court, then continued:

> With your verdict, ladies and gentlemen, you are going to do one of two things: you will either in large measure restore this family to its former healthy state, or you will sever the head from the body of this family. . . The people of Western Pennsylvania wait your verdict. Thank you.

The court had stated on the record the following:

> The court ruled, I believe, on Thursday or Friday, pursuant to the motion of Mr. Gondelman that the defendant could selectively waive his privilege against self-incrimination. . . In reliance thereon the defendant took the witness stand. Mr. Gondelman took him through a number of episodes and events. Thereafter, the cross-examination began and will continue today. I am simply putting this on the record. I

> am cautioning the prosecutors that the cross- examination must be confined to matters on which he has testified on direct examination or opened the door on cross-examination, and I have a responsibility to police it.

The Court of Appeals cavalierly dismissed the issue of prosecutorial misconduct in footnote 1 (App. 3a), stating that it did not address in detail the issue because they found it clearly without merit.

All of the government witnesses who admitted that they were involved in drug trafficking or other illegal activities testified under plea bargain agreements, including 5-K motions which were acted on favorably after the conviction of Porter. A Philadelphia witness who admitted he was part of the Philadelphia La Cosa Nostra and who admitted to committing two murders personally and arranging for eight others has had his

sentence reduced to six and one-half years -- 7.8 months per admitted murder. The others were allowed wide range of testimony relating to events which were not tied in to the conspiracy alleged in the indictment. By actual count, 13 hearsay declarants whose testimony came in through government informant witnesses are dead. Other hearsay declarants were not called as witnesses by the government but their testimony was elicited through witnesses with whom the prosecutors had made a deal. One of the hearsay declarants -- Plisko -- had been listed as a witness for the government and it was not until two-thirds of the way through trial that the government for the first time stated that they did not intend to call him as a witness. His 302 statements had been made a available to defense counsel who intended to cross-examine Droznek, the

witness who had been permitted to quote Plisko as a hearsay declarant. The defense intended to elicit from the witness on the stand that the hearsay declarant had made statements implicating judges, attorneys and others as being under the sphere of influence of the Mafia. An Assistant United States Attorney had been subpoenaed since he had stated at a sentencing hearing for Plisko that the United States Attorney had found Plisko not to be a truthful witness.

The court sustained objections to cross-examination of the witness with a statement "That's right. And the problem with that, if Plisko doesn't appear, then what's the relevance of it."

The trial court further ruled that the prejudice to those named but not parties to the proceeding far outweighs any relevance where the purpose was to

show that the hearsay declarant who, under the Federal Rules of Evidence, should be treated as if he had appeared as a witness was totally incredible. The jury also was not able to hear testimony that the government itself found Plisko, who they had called as a witness through his hearsay declarations, not truthful.

Four of the co-defendants had indicated that they would be willing to appear as witnesses for Porter if their cases were severed from Porter's and they were granted use immunity. Two of the witnesses were the prime suppliers of cocaine which was the core of the indictment against this defendant. Both Sosa and Levie would have testified that they did not know Charles Porter and had no knowledge of his being involved in any drug trafficking or drugs which they supplied. Durish and Chiarelli would

have testified that Porter did not participate in any drug dealings in which they were involved and Durish would have testified to the events which occurred in Florida on a trip which Porter admittedly made with Porter's wife and Durish and his wife. The trial court was willing to grant use immunity to these witnesses but when the qualification was made by their counsel that their testimony was predicated upon a severance, he denied the severance and was not faced with the issue of whether to grant use immunity. The defendant was therefore put to the impossible burden of attempting to show what witnesses would testify to if they were immunized but unable to call them as witnesses to prove that they had exculpatory testimony. The Court of Appeals found that Porter failed to produce affidavits, which affidavits

Porter could not produce unless and until a severance and immunity were granted. Thus the argument against Porter was an attempt by the Court of Appeals to pull itself by its own boot straps in order to sustain a conviction rather than address the due process issue objectively. The Court of Appeals then hypothesizes that since the co-defendants were subject to cross-examination, that court in the quiet of law library analysis, finds it was exceedingly unlikely that the contradictory evidence offered by Porter would have withstood cross-examination. That is a factfinding function which should be tested in a courtroom, not in the conjecture of an appellate court opinion.

The defendant objected to the court's allowing the 116-page indictment to go out with the jury since the

indictment is not evidence. Recognizing that courts have allowed indictments to go out with the jury, Porter prepared an answer to each and every count of the indictment; filed it with the clerk of courts and requested the trial court to allow the answer to go out with the jury if it were going to allow the indictment to go out with the jury. The trial court refused the request and sent the indictment out with the jury. The Court of Appeals concluded that the lower court did not abuse its discretion in sending the indictment out to the jury and that since there has been no case cited where an answer should go to the jury room and there is no provision in the Rules of Criminal Procedure for answers to indictments, the district court did not abuse its discretion in making this decision. (App. 21a-24a)

REASONS FOR GRANTING THE WRIT

I.

Federal Rule of Evidence § 806 provides:

> When a hearsay statement, or a [co-conspirator's statement as defined in Rule 801(d)(2)(E)] has been admitted in evidence the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes <u>if declarant had testified as a witness</u>. (Emphasis added)

The credibility of witnesses was, as in most trials, the key issue to be resolved by the jury. All government witnesses were married to the prosecution and to the court through the blossoming use of Rule 5K motions where the prosecutors, with the blessing of the trial courts, buy the testimony of informers. In this case, the overwhelming majority of the testimony was that of hearsay declarants through

the mouths of witnesses waiting for their payoff in reduced sentences. In the case of the witnesses quoting a hearsay declarant by the name of Plisko, the United States Attorney's Office was aware of the fact that he was not a truthful witness and during the trial disclosed that they were not going to call him personally to the stand. The trial court and the United States Attorney's Office harbored the misconception that by not calling Plisko personally to the stand to testify that they were not vouching for his truthfulness nor could he be impeached as if he had testified. This issue has great importance to the administration of the criminal justice system in the federal courts and should be addressed by this Court to set standards for lower courts to follow. See footnote 2, infra, re United States v. Salerno.

As stated in United States v. Moody, 903 F.2d 321 at 329 (5th Cir. 1990):

> The court harbored the misconception, reinforced by the government, that hearsay declarants cannot be impeached if they fail to testify at trial. This belief is squarely contradicted by Fed.R.Evid. 806 which provides "When a hearsay statement, or a [co-conspirator's statement as defined in Rule 801(d)(2)(E)] has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness (emphasis the court's). Thus, a hearsay declarant is deemed to be a witness whose credibility is subject, in fairness, to impeachment. . . Impeachment of out-of-court declarant may be accomplished, for example, by testimony of prior convictions, reputation, or prior inconsistent statements. . . The scope of impeachment parallels that available if the declarant had testified in court, since Rule 806 treats the physical location of the testifying

declarant, for impeachment purposes, as legally insignificant.

Asking a witness in court under oath to recite the hearsay declarations of Plisko allowed the government to put Plisko's testimony into evidence with extremely limited cross-examination permitted by the court. In United States v. Wallach, 935 F.2d 445 (2d Cir. 1991), the Court held that the perjury of one of the government's key witnesses affected the trial proceedings and interfered with the jury's ability to weigh his testimony and the conviction was reversed. Although this case involved the government's use of a witness who knowingly had committed perjury, the basic concept is applicable to the case sub judice in that the government knowingly used a witness through hearsay declarations who they knew was not trustworthy. The

government then objected to any attempt to establish the untrustworthiness of the hearsay declarant by moving to quash the subpoena on the Assistant United States Attorney who made the representation in open court during a collateral proceeding that Plisko was untruthful and also in objecting to questions which would have shown that Plisko told the testifying witness untruths concerning the involvement of pillars of the community.

The idea that the government would knowingly rely on false testimony in obtaining a conviction is repugnant to the very concept of ordered liberty and is perhaps the most grievous accusation that can be leveled against a prosecutor. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177 (1959). The trial court was more concerned with the reputations of those who Plisko told

Drosnek could be influenced and bribed than it was with the rights of the defendant under the Sixth Amendment to confront witnesses, in this case Plisko, by attacking credibility. It is interesting that the Court of Appeals dismisses the error in not allowing co-defendants to be called as witnesses by granting a severance on the theory that they could be so impeached as to not change the outcome of the case and yet dismissed the same argument relating to a government informant's testimony of a hearsay declarant which, if impeached, might have cast doubt on the whole fabric of the government's case.

The admonition of Judge Hastie in his dissent in United States v. Mesarosh, 223 F.2d 449 (3d Cir. 1955), is clear if one substitutes the word "Mafia" or the words "LaCosa Nostra" for

the word "communist." [1] Judge Hastie prefaced his dissent, at page 459, as follows:

> "Judges are likely to be thoughtful, patriotic and well informed citizens who over the years have read, heard and observed much about the worldwide organization of the Communist Party and its activities. Therefore, they cannot escape serious apprehension, or even strong personal conviction, that policies and practices both hostile and dangerous to our institutions are promoted by that organization. Jurors too are likely to share these apprehensions and convictions. Moreover we do not and should not apologize that our ethical notions, religious convictions and political views of the type of social order that is decent and rewarding to its members, all combine to make the totalitarian communist state as it functions in much of the world today odious and frightful in our sight. These

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[1] It is interesting that the Mesarosh case was sent back for a new trial when the Solicitor General of the United States admitted that a government witness had lied. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1 (1956).

> facts of life are stated at the outset because they add greatly to the difficulty of deciding such a case as we have here. The defendants are Communists. They are charged with conspiracy to teach and persuade people that they should engage in violent insurrections against our government as speedily as circumstances may permit. The record is very long and its analysis is a tedious and unwelcome task. Under such circumstances it is very difficult to evaluate thousands of pages of testimony and exhibits without somewhere along the line permitting the thought that these defendants are an undeserving lot, and likely to have done the things with which they are charged, to distort judgment of the probative value of the evidence, or even to take the place of evidence on some important issue. (Emphasis added)

The same can be said of this case since the opinion of the Court of Appeals states it involves a massive organized crime prosecution with seven defendants and the enterprise under scrutiny is the Pittsburgh arm of the

Mafia or LaCosa Nostra. Having said that, it is a foregone conclusion that everything done in the lower court, no matter how wrong, is harmless error. But a defendant facing a life sentence should be accorded appellate scrutiny suggested by Justice Thurgood Marshall's dissent in Barkley v. Florida, 103 S.Ct. 3418 at 3445, 463 U.S. 939 at 988 (1982), when he held:

> "If appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in trial court proceedings."

The government heavily relied on witnesses quoting deceased persons and others to create the atmosphere of conspiracy through the magic use of words such as "Mafia" and "LaCosa Nostra." Defendant's counsel attempted to show that much of the testimony of hearsay declarants were figments of the imagination either of the witnesses on

the stand hoping to curry favor with the prosecutor and have their own sentences reduced, which has been done, or figments of the imagination of the hearsay declarant whose testimony was before the jury as if he were called as a witness. The impeachment of the testimony of hearsay declarants would have been possible if the 302 statements of the F.B.I. had been allowed as the basis for cross-examination. That denial deprived defendants of their Sixth Amendment constitutional right to confrontation of witnesses who have testified against the defendant in absentia. The life sentence imposed on this defendant demonstrates that his liberty was at least as important as the reputations of those whose names defense counsel has been prohibited from using to this date. The trial court indicated that a federal judge had been cleared by

the F.B.I. of any implication of involvement with the Mafia as represented in a 302 statement by a hearsay declarant. The fact that the hearsay declarant's attempt to implicate a federal judge was false, was certainly material to the impeachment of the witness and at least the factfinder should have had the testimony to weigh in judging the credibility of those who did not appear in person. A uniform rule applicable in all federal courts should be established by this Court and accord to defendants, at least in the federal judicial system, the right of confrontation by meaningful cross-examination.[2]

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[2] As stated by Wigmore in 5 J. Wigmore, Evidence, § 1367, p. 32 (J. Chadbourn rev. 1974), cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth. . . . "In United States v. Salerno, 60 L.W. 4650, decided June 19, 1992, Justice Stevens in his dissent states: "In the Anglo-American legal system cross-examination is the principal means of

(continued)

II. and III.

The American Bar Association Project on Standards for Criminal Justice - The Prosecution Function - states in paragraph 5.6, Presentation of Evidence, subparagraph (b), as follows:

> It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

Charles Porter knew that he had been subjected to surveillance by the F.B.I.

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undermining the credibility of a witness whose testimony is false or inaccurate." In Salerno, this Court decided the issue of the interpretation of 804(b)(1) of the Federal Rules of Evidence and remanded the case to the Court of Appeals for the Second Circuit to address the factual issue of whether the United States had a similar motive to develop grand jury testimony which would have allowed the grand jury testimony to be used at the trial by the defendants.

for over twenty years. Since the core of the indictment was cocaine trafficking and since Charles Porter categorically denied that he had ever been involved in that illegal activity, he desired to take the stand to deny testimony implicating him in drug trafficking. The motion in limine granted by the court allowed him to take the stand and, as stated by the court, counsel took him through a number of "episodes and events" on direct examination. The prosecutor knew that Porter had taken the stand in reliance on that ruling by the trial court. Nevertheless, the prosecutor on cross-examination asked "Can you tell me, sir, did you know an individual by the name of John LaRocca?" Objection sustained. He was asked about a trip to Niles, Ohio with Mr. Genovese. Objection sustained. "Did you know Louis Volpe?" Objection

sustained. "Did you know a Kelly Mannarino?" Objection sustained. He was asked whether he was familiar with L&A Motors where a good bit of video surveillance had taken place. Objection sustained. He was asked if after the Holiday House, which had been under surveillance for years by the F.B.I., had been torn down did he meet with Mr. Genovese on a regular basis. Objection sustained. The prosecutor framed a question of the defendant to the effect that a witness withheld information "because of your reputation, Mr. Porter" to which question an objection was made and sustained.

Paragraph 5.8, Argument to the Jury, subparagraph (d) of the American Bar Association Project on Standards for Criminal Justice - The Prosecution Function - provides:

> The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. (Emphasis added)

Paragraph 5.8(c) states:

> "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury."

In closing arguments, the prosecutor told the jury "What happens next depends on you, the head of this organization is not in court yet." He further told the jury that their verdict would in a large measure restore the family to its former healthy state or they could sever the head from the body of the family and "the people of Western Pennsylvania wait

your verdict. Thank you."[3] A motion for mistrial was denied. Mr. Justice Jackson in his concurring opinion in Krulewitch v. United States, 336 U.S. 440 at 453, 69 S.Ct. 716 at 723 (1949), observed:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction."

In Ash v. United States, 54 F.2d

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[3] In Commonwealth v. Chambers, 599 A.2d 630, ___ Pa. ___ (1991), cert. denied, the Pennsylvania Supreme Court vacated the setence of death because of prosecutorial misconduct in an argument in favor of the death penalty. The argument there made by the prosecutor was "As the Bible says, 'and the murderer shall be put to death.'" The injection by the prosecutor of religious law as an additional factor for the jury's consideration neither flowed from the evidence nor any legitimate inference to be drawn therefrom. In the instant case, whether the Godfather was in court yet or whether the people of Pennsylvania wait the verdict of the jury were extraneous factors appealing to the passions, biases and prejudices of the jurors rather than inferences flowing from the evidence.

1006 at 1007 (2d Cir. 1932), Judge Hand cogently held:

> "that the cautionary instruction for a jury to disregard evidence is a 'recommendation to the jury' of a gymnastic which is beyond, not only their powers, but anybody's else . . ."

In United States v. Delli Paoli, 229 F.2d 319 (2d Cir. 1956), Judge Hand referred to cautionary instructions such as these as a "placebo." Judge Frank, in his dissent in United States v. Grunewald, 233 F.2d 556 (2nd Cir. 1956), at page 574, stated:

> "Fletcher, Morals and Medicine (1952) (51-52), calls a placebo" or "bread pill" a medicinal "lie" which undermines 'a truly moral relationship between physician and patient;' it encourages the idea . . . that drugs will cure most ailments and this serves to extend the patent-medicine evil.

Similarly, such a cautionary instruction is a kind of

> "'judicial lie;' it undermines a moral relationship between

> the courts, the jurors and the public; like any other judicial deception, it damages the decent judicial administration of justice."

The admonition of Justice Sutherland in Berger v. United States, 294 U.S. 78, 55 S.Ct. 619 (1935), speaking for a unanimous court, was never more apposite:

> The United State Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all: and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is

> to use every elgitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak -- depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

More and more frequently appellate courts are sweeping trial court error under the rug of "harmless error." The late Justice Tom Clark, sitting as a Seventh Circuit Court of Appeals Judge in 1970, stated in United States v.

Jackson, 429 Fed. 1368 at 1373:

> "'Harmless error' is swarming around the 7th Circuit like bees. Before someone is stung, it is suggested that the prosecutors enforce Miranda to the letter and that the police obey it with diligence; otherwise the courts may have to act to correct the presently alarming situation."

IV.

In United States v. Weisman, 899 F.2d 111, 115 (11th Cir. 1990), that court correctly held:

> It must be stressed that the government, through its ability to craft indictments, is the master of the scope of the charged RICO conspiracy. . . . The government, through the vehicle of the indictment, provides the linking conspiratorial objective of a specific RICO violation. The "specific" violation can be broad or narrow. . . . it is the prosecution which sets the parameters to which a RICO conspiracy trial must be confined; having set the stage, the government must be satisfied with the limits of its own creation. United States v. Neopolitan, 791 F.2d 489, 501 (7th Cir. 1985).

Too often the courts pay lip service to the fiction that it is the grand jury that somehow causes a presentment of an indictment rather than acknowledging the fact, as set forth in the Seventh and Eleventh Circuits, that it is the government attorneys who draft the document knowing it is the practice to send it out with the jury.

Because of the repetitious use of the words "Mafia," "LaCosa Nostra," "the mob", "the family" and other terms and incidents of which there was little or no evidence, the defendant objected to the indictment going out with the jury. The trial court overruled that objection. Defendant then filed an answer to the indictment and suggested to the court that since the indictment, which is not evidence, was going out with the jury, defendant's answer thereto should also go out to the jury

with the admonition that it also is not evidence. At least the jury would then be reading two sides of the version of contested facts and issues. The court refused to allow the answer to go out with the jury. In United States v. Williams, 809 F.2d 75 (1st Cir. 1986), the Court stated, at page 81:

> "In analyzing whether actual prejudice flowed from this error, we note that the government has the burden to show that the extrinsic material was harmless beyond a reasonable doubt."

citing Lacy v. Gardino, 791 F.2d 980, 983 (1st Cir. 1986); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). In the Williams case the trial court held the indictment would not be submitted to the jury as "highly prejudicial" listing people and things which did not implicate defendants. The Court then read portions of the indictment in response

to a defense counsel's argument including two overt acts of which there was no evidence. This case is cited for the fact that such extrinsic evidence could create errors of constitutional proportions, which is a violation of Sixth Amendment rights to trial by jury, and the subjecting of evidence to confrontation and cross-examination, although the Williams court held it was "harmless error."

In this case, since the credibility of witnesses was so much in issue and where each of the government witnesses had made deals with the government resulting in their being granted their freedom and reducing their periods of incarceration by many years, as well as the repetitive errors in ruling on evidence. it is respectfully submitted that the errors are prejudicial beyond a reasonable doubt.

Submitting the indictment to the jury could only emphasize the improper cross-examination of the prosecutors placing the names of Sebastian John LaRocca as boss of the Pittsburgh LaCosa Nostra family and Gabriel Mannarino as an underboss, both of whom are deceased in the jury room. The same is true of the name Michael Genovese and many other names obviously of Italian extraction used in the improper cross-examination Porter but nevertheless still placed before the jury in the indictment. The admonition of Mr. Justice Jackson in Kurlewitch, supra, was never more apposite in that it is a naive assumption that prejudicial effects can be overcome by instructions to the jury. To allow an inflammatory indictment such as this to be in a jury room with the statement that it is not evidence is a recommendation of a gymnastic which is

beyond anyone's power. It is in the words of Judge Frank in United States v. Grunewald, supra, a "judicial lie."

To refuse to allow the answer to the indictment to be placed before the jury certainly helped keep the playing field from becoming a little more level. It tilted heavily in favor of the prosecution. A uniform rule applicable to using indictments as non-evidentiary submissions to a jury should be established. In the Williams case, supra, the First Circuit Court of Appeals held that extrinsic material submitted to a jury must be shown to be harmless beyond a reasonable doubt and the burden is on the government. In that case the conviction was affirmed. It is submitted that in the case sub judice there can be no showing of harmless error beyond a reasonable doubt in light of the compounded errors that

accumulated to the prejudice of Porter.

V.

Four co-defendants indicated that they would be willing to appear as witnesses for Porter if they were granted use immunity and their cases were severed so that the same jury would not pass upon their guilt or innocence. The trial court had indicated that it would grant use immunity and an offer was made as to the exculpatory testimony to be elicited from each of the co-defendants. However, when the co-defendants' availability was conditioned by their counsel on a severance, the trial court denied the severance and never reached the issue of use immunity. The Court of Appeals sustained Sosa's conviction reciting that Sosa "contacted Chiarelli and Porter almost immediately after the rip-off." It was represented to the court that Sosa would have

testified that he never met Porter and did not know Porter. The same is true of the co-defendant Levie. Levie would have testified that he did not know Porter nor did he ever have dealings with Porter.

Chiarelli would have testified that he was not involved with buying drugs or ripping off Raymond Sosa. He would have also denied telling the witness Rosa that he got any money from Chuck Porter from the alleged rip-off. Durish would have testified that the one trip to Florida that he made with Porter and their wives was in the nature of a personal trip and that he never witnessed any drug dealings, thus refuting the core charges of the indictment, namely, the eight drug counts and the drug conspiracy. The Court of Appeals, in its footnote 4 (App. 17a), indicates that the district

court did not grant immunity and none of the parties has raised the issue on appeal. Of course, the issue raised on appeal was the failure to grant a severance because the court then having denied the severance rendered the issue of granting use immunity moot. The Court of Appeals' argument is a heads I win, tails you lose type of dilemma. United States v. Shuford, 454 F.2d 772 (4th Cir. 1971), held that a severance is obligatory where one defendant's case rests heavily on exculpatory testimony of co-defendants who are willing to give such testimony but for fear of taking the stand in a joint trial which would jeopardize the co-defendant's own defense. See also United States v. E.C. Heles, 352 F.2d 892 (7th Cir. 1965). In the Shuford case at page 777, the Court held:

> In a situation where the elusive quality of credibility is of such importance, the jury should have the benefit of all relevant testimony likely to shed light on the situation. We think that the denial of the severance, resulting in withholding this witness' testimony on such a critical point, so tipped the scales against Shuford that he failed to receive a fair trial. A verdict based so heavily on less than the full available testimony, where the missing testimony could, with relative ease have been procured, should not stand.

Porter was faced with hearsay declarations of alleged co-conspirators Chiarelli, Durish and alleged involvement with Sosa and Levie. The four co-defendants, if severed, would have testified as outlined above. If the jury heard from them that they were not involved with Porter; that Durish saw no drug transactions at the times Rosa testified he saw him with Porter in Florida; that Durish would have testified as to why he was in Florida

with Porter, the jury could well have determined that government informant witnesses were not credible. Their relevant testimony, if believed by the jury, could have raised a reasonable doubt. The jury had no opportunity to hear the testimony and to determine its credibility because the lower court refused the severance. A verdict against Porter, paraphrasing Shuford, which is based so heavily on less than the full available testimony, should not stand and a new trial must be granted.

Judicial economy must fail where substantial constitutional rights of a defendant are affected. Furthermore, the separate trials of Chairelli, Durish, Levie and Sosa would not nearly have been as time-consuming as the trial involving Porter since the government chose to go back to 1967 as to Porter, although their evidence in that regard

was not accepted by the jury. As a predicate act the jury found that the Domestic Finance robbery was not proved and that was the only matter extending back to 1967.

The Court of Appeals conceded that the testimony to be elicited would certainly "have been exculpatory . . . ." (App. 18a) It then accepts the government argument that it would have been readily impeached. The Court then hypothesizes that it is exceedingly unlikely that the "contradictory evidence offered by Porter would have withstood cross-examination even if it were true that the co-defendants would have testified as Porter claims." (App. 18a) The admonition in United States v. Bagley, 473 U.S. 667 at 682 (1985), 105 S. Ct. 3375 at 3383, is apposite and cautions that reversible error would occur if the evidence is material and

there is a reasonable probability that had the evidence been admitted the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

CONCLUSION

The trial court erred in refusing to allow hearsay declarants to be impeached by statements made to the F.B.I. concerning the scope of the alleged enterprise and its ability to influence judges, prosecutors, lawyers and football stars. Prosecutorial misconduct occurred when the prosecutor asked questions beyond the scope of direct examination and flouted the court's admonition when it granted a motion in limine. Prosecutorial misconduct occurred when the prosecutor argued to the jury that the head of the organization was not in court "yet" and

that what happens next is up to the jury. He further argued that the people of Western Pennsylvania wait for the jury verdict to see whether it will restore the family to its former healthy state or "sever the head from the body of this family."

The trial court erred in refusing a severance to allow four co-defendants to offer exculpatory evidence. The prejudice was compounded when the 116-page prejudicial indictment was allowed to go out with the jury to be viewed by them during their deliberations while being told that it "is not evidence." The prejudice was compounded by refusing to allow an answer filed so that at least an attempt at balance would be achieved in the jury room during deliberations.

The sum total of the trial error cavalierly dismissed by the Court of

Appeals without attempting to detail its reasoning should not be deemed "harmless error" but, rather, an infringement of basic constitutional guarantees prejudicial to the defendant beyond all reasonable doubt. The decision of the Court of Appeals should be reversed and the cause remanded.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

On Appeal From the United States District Court for the Western District of Pennsylvania (D.C. Crim. Action Nos. 90-00035-2, 90-00035-1, 90-00035-6, 90-00035-3, 90-00035-4, 90-00035-5, 90-00035-7)
District Judge: Honorable Donald E. Ziegler

Argued October 18, 1991

BEFORE: STAPLETON, SCIRICA, AND ROTH,
Circuit Judges

(Opinion Filed Apr 27 1992)

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge:

This case involves a massive organized crime prosecution with seven defendants, a 116-page indictment covering 38 counts, a 9-week trial involving nearly 80 witnesses, and a 22-volume appellate appendix. Viewing the evidence in the light most favorable to the government as we are required to do, the enterprise under scrutiny is the Pittsburgh arm of the Mafia or La Cosa Nostra ("LCN"). In this appeal, the defendants raise numerous issues concerning the district court's handling of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), RICO conspiracy, and the underlying drug offenses that served as predicate acts. We address below several of these issues

raised by the defendants.[1]

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[1] We do not address in detail the following issues raised by the defendants which we find to be clearly without merit:

1) Whether the district court erred in admitting the transcript of an enhanced tape recording of an intercepted communication and in admitting the tape into evidence without authentication testimony.

2) Whether the district court erred in refusing to admit particular evidence offered to impeach a hearsay declarant.

3) Whether the district court erred in particular rulings on the admissibility of evidence.

4) Whether the district court erred in concluding that the government's cross-examination of Porter did not constitute prosecutorial misconduct.

5) Whether the district court erred in concluding that Sosa's RICO prosecution was not barred under the double jeopardy clause due to his prior conviction for conducting a continuing criminal enterprise.

6) Whether the district court erred in concluding that RICO is not unconstitutionally vague.

7) Whether the district court erred

(continued...)

I. FACTS

The facts in this case are complicated primarily because of the vast amount of information that was

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[1](...continued)
in denying a motion to dismiss the indictment on the ground that it was pre-signed by the United States Attorney when presented to the grand jury.

8) Whether the jury's inconsistent verdicts with regard to Chiarelli required reversal.

9) Whether there is substantial evidence in the record to support the jury's verdicts against William Porter for attempted possession of cocaine, obstruction of justice, and retaliation against a witness.

10) Whether the district court erred in sentencing the defendants based upon the amount of drugs involved in the entire conspiracy which may not have been foreseeable to the defendants.

11) Whether the district court erred in enhancing the sentences of Raucci and Chiarelli for their role in the offense.

12) Whether the district court erred in deciding to sentence William Porter under the guidelines rather than according to pre-guidelines sentencing procedures.

presented to the jury. Testimony at trial, viewed in the light most favorable to the government, established essentially three factual scenarios that the government contends are all part of one large conspiracy involving the Pittsburgh LCN. The first scenario involves Louis F. Raucci, Sr., Irwin "Bud" Levie and Joseph "Joey" Rosa. Raucci, a reputed underboss in the Pittsburgh LCN, introduced Rosa, an underling and future government witness to Levie, Raucci's Florida cocaine connection. Raucci and Rosa flew to Florida to meet Levie and to purchase two kilograms of cocaine. Rosa bought the cocaine from Levie and later sold it. For brokering the deal, Raucci took a $5,000 cut of Rosa's take. This arrangement continued for several transactions, but eventually Rosa began to deal with Levie behind Raucci's back in

order to keep more of the profits for himself.

The second scenario also involves Rosa. For some time, Rosa apparently switched from Raucci to Charles Porter, another Pittsburgh LCN underboss, as his intermediary for drug buys. Rosa attended a meeting at Porter's house where a deal was discussed involving Ramon Sosa, Porter's Florida cocaine connection. At the meeting, Porter and Geno Chiarelli informed Rosa that they planned to do substantial business with Sosa over a period of time and then rip him off with counterfeit money. Chiarelli apparently had a contact who could provide them with the counterfeit bills. They anticipated a split of the profits among Porter, Chiarelli, Rosa and another of the defendants, Anthony Durish.

Rosa, Chiarelli, and Durish flew to

Florida to begin the plan. They were later joined by Charles Porter and purchased three kilograms of cocaine, which Rosa sold. He divided the profits with Chiarelli, Durish and Porter. Rosa made approximately 20 other drug buys from Sosa after this initial purchase in quantities of three to ten kilograms each. However, before the plan was completed, Rosa ripped off Sosa himself by buying 15 kilograms for approximately $100,000 that was packaged to look like $400,000. Porter and Chiarelli learned of the rip-off shortly after it happened and demanded a share of the proceeds.

The third scenario involves primarily the activities of William Porter, Charles Porters' younger brother who was apparently used as muscle by the Pittsburgh LCN. On one occasion, an undercover FBI agent was introduced to him and attempted to involve Porter in a

drug deal. Although the two negotiated terms, the deal was never consummated. The other facts in the record regarding William Porter concern his alleged intimidation of a government witness who had provided information to the FBI about LCN activities. The government claims that Porter received information regarding the identity of this witness from John Carrabba. Carrabba obtained information concerning FBI investigations of the Pittsburgh LCN through his social relationship with Jackie Wymard, an FBI secretary working in the organized crime investigation unit. Wymard has pled guilty to leaking this information.

While the government evidence with respect to specific conduct and dates focused on these three scenarios, Rosa and other witnesses testified about the existence and character of the LCN

organization and about these three episodes being part of its affairs.

II. SEVERANCE

Appellants Raucci, Charles Porter, Chiarelli, William Porter, and Levie[2] challenge the district court's denial their motions for severance under Rule 14 of the Federal Rules of Criminal Procedure.[3] Severance decisions are

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[2] Although Durish and Sosa did not explicitly raise the severance issue in their briefs, they have incorporated their co-appellants' arguments by reference under Rule 28(i) F.R.A.P. We have therefore considered the severance issue with regard to their cases as well.

In fact, all the defendants have incorporated the arguments of their co-defendants by reference. Except in those instances where the argument of one defendant clearly did not fit the situation of another, we have considered the purported errors raised as they may affect each of the various defendants.

[3] Rule 14 provides:

If it appears that the defendant or the government is prejudiced by a joinder of

(continued...)

within the sound discretion of the trial court. Therefore, we review challenges to the district court's denial of a motion for severance for an abuse of that discretion. United States v. Sandini, 888 F.2d 300, 305 (3d Cir. 1989), cert. denied, 494 U.S. 1089 (1990).

In Sandini, the court set out the manner by which we address severance issues on appeal:

> It is important to recognize that there are two separate determinations to be made when

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[3](...continued)
offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

> a defendant on appeal urges that he is entitled to a reversal because the district court denied a pretrial severance motion. Since the district court acted on the basis of the record before it at the time of the motion, we must first determine from that record whether the court abused its discretion in denying the severance. Then, if there was an abuse of discretion, we must consider whether the defendant was prejudiced by the order denying severance.

Id.

Generally, the district court will not be deemed to have abused its discretion unless the defenses offered by the various defendants conflict to the point of being "irreconcilable and mutually exclusive." United States v. Provenzano, 688 F.2d 194, 198 (3d Cir.) ("'[T]he mere presence of hostility among defendants' is insufficient to require separate trials"), cert. denied, 459 U.S. 1071 (1982). The irreconcilable nature of the competing defenses

must be such that it outweighs the interests of judicial economy that are fostered by joint trials of jointly indicted defendants. United States v. Simmons, 679 F.2d 1042, 1051 (3d Cir. 1982) (As a general rule, "defendants who are jointly indicted should be jointly tried."), cert. denied, 462 U.S. 1134 (1983).

It is clear that the district court did not abuse its discretion in denying severance to these defendants. They have not presented any compelling evidence that the district court should have foreseen "irreconcilable and mutually exclusive defenses." Moreover, even assuming an abuse of discretion on the part of the district court, the defendants have failed to demonstrate that they were prejudiced by that decision.

A. "Spill-Over Effect"

Defendants Levie and William Porter claim that they suffered prejudicial spill-over effect from the presentation of evidence against their co-defendants. This argument is based upon the presentation at trial of vast amounts of evidence regarding crimes in which these two defendants did not participate. William Porter also argues that because he was tried with his brother, he was prejudiced by spill-over and jury confusion regarding evidence pertaining only to Charles Porter. However, as the government notes, it is well established that a disparity in the amount or the quality of evidence introduced against one defendant but not another is generally not sufficient to justify severance. United States v. Ward, 793 F.2d 551, 556 (3d Cir. 1986); United States v. Smith, 789 F.2d 196, 206 (3d Cir. 1986). The primary consideration

is whether "the jury can reasonably be expected to compartmentalize the evidence as it relates to the separate defendants." United States v. DeLarosa, 450 F.2d 1057, 1065 (3d Cir. 1971), cert. denied, 405 U.S. 927, 957 (1972).

Under this standard, Levie's argument that he was tarred by the same brush as his arguably more culpable co-defendants is insufficient for reversal. There is no indication that the jury was incapable of compartmentalizing the evidence. In fact, just the opposite is true: the jury acquitted defendants on several counts in which the government failed to carry its burden. The district court did not abuse its discretion in denying levie's severance motion.

William Porter's claim is equally unconvincing. He was only convicted of offenses in which the government

explicitly presented evidence against him. In fact, the jury concluded that William Porter did not commit several racketeering acts that the government alleged and acquitted him of all the counts in which both he and his brother were charged. It is clear that the jury did compartmentalize the evidence and that William Porter was not prejudiced by being tried with his brother.

B. Testimony of Co-Defendants

Charles Porter argues that the court's refusal to sever his trial prejudiced him because he could not call his co-defendants to testify. In United States v. Boscia, 573 F.2d 827 (3d Cir.), cert. denied, 436 U.S. 911 (1978), we held that in these circumstances, the court must balance the following four factors when deciding whether severance is necessary: "(1) the likelihood of co-defendant's testifying;

(2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendants could be impeached; (4) judicial economy." Id. at 832 (citing United States v. Rosa, 560 F.2d 149 (3d Cir. 1977) (in banc)). In addition, "bare assertions that codefendants will testify are insufficient." United States v. Gonzalez, 918 F.2d 1129, 1137 (3d Cir. 1990); cert. denied, 111 S. Ct. 1015, 1604, 1637 (1991).

Consideration of this precedent leads us to the conclusion that the district court did not abuse its discretion in denying severance to Charles Porter. First, it is not at all clear that Porter's co-defendants would have testified had the severance been granted. The district court requested that the putative witnesses submit affidavits stating that they would

testify and summarizing the content of that testimony. Porter failed to produce such affidavits. Although Porter now claims in his brief that all of his co-defendants were willing to testify and makes some claims as to what that testimony would be, this information was not presented to the district court.[4] Porter next claims that the testimony he would have presented would have been exculpatory. He argues that several of the co-

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[4] Apparently, Chiarelli stated in an unsworn statement that he would testify for Porter if granted use immunity. However, the government had no intention of granting immunity to Chiarelli. Although the court apparently considered granting immunity on its own accord, this court has noted that the "decision to grant immunity is reserved to the discretion of the executive branch." United States v. Adams, 759 F.2d 1099, 1107 (3d Cir.), cert. denied, 474 U.S. 906, 971 (1985). The district court did not grant immunity and none of the parties have raised the issue on appeal.

defendants would have testified that they did not know Porter. Others would have testified that he did not make the deals that the government alleged that he had made.

While such testimony would certainly have been exculpatory, the government correctly argues that it would have been readily impeached. The government presented documentary evidence and the testimony of a wide variety of witnesses in making its case. It is exceedingly unlikely that the contradictory evidence offered by Porter would have withstood cross-examination even if it were true and the co-defendants would have testified as Porter claims. In sum, the district court did not abuse its discretion in deciding that judicial economy out-weighed Porter's request for severance based upon obtaining the testimony of

his co-defendants.

C. Charles Porter's Testimony

Chiarelli and Raucci claim prejudice based upon the fact that Charles Porter testified in his own defense. Their argument revolves around the strict limitations on cross-examination that the district court imposed on both the government and the other defendants. In granting Porter's motion in limine requesting permission to testify and selectively to exercise his testimonial privilege, the court prohibited counsel from cross-examining Porter on any matter not explicitly raised on direct.

Chiarelli and Raucci claim that the district court's handling of Porter's testimony prejudiced them because Porter did not testify regarding the existence or nonexistence of the Pittsburgh LCN. They claim that their defense strategy was to deny the existence of the LCN and

that Porter's failure to mention the subject was a tacit admission of the enterprise's existence. This argument is also without merit. It is true that Porter's direct examination was carefully crafted to limit cross-examination as much as possible. But Porter's testimony is no more a tacit admission of the existence of the Pittsburgh LCN than if he declined to testify altogether. The government notes, and the defendants do not dispute, that Porter in no way implicated himself or any of the other defendants in criminal activity. Therefore, this limitation on cross-examination did not constitute the clear and substantial prejudice resulting in a manifestly unfair trial that is necessary for reversal.[5]

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[5] In addition to claiming error (continued...)

In sum, the district court did not abuse its discretion in denying the defendants' motion to sever. Moreover, Moreover, even if the court did err, the defendants have not demonstrated the prejudice necessary to justify reversal.

III. THE INDICTMENT

Charles Porter's next argument is that the district court erred in sending the indictment to the jury during its deliberations while refusing to send his answer to the indictment to

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[5](...continued)
based upon the district court's refusal to grant a severance before trial, defendants argue that the court breached its "continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. United States, 362 U.S. 511, 516 (1960). See also Sandini, 888 F.2d at 409. However, we have already concluded that the defendants suffered no prejudice as a result of the joinder. Because a defendant must show prejudice in order to prevail regardless of whether the denial of severance came before or during trial, this argument also fails.

the jury. Because this decision lies within the discretion of the trial , we reverse only for abuse of discretion. United States v. Todaro, 448 F.2d 64, 66 (3d Cir. 1971), cert. denied, 404 U.S. 1040 (1972).

Porter characterizes the 116-page indictment as a "Francis Ford Coppola Godfather sequel" and claims that he was prejudiced when the district court permitted the jury to have a copy of the indictment during its deliberations. He states that repeated use of the words "La Cosa Nostra," "the mob," and "the Family" created an atmosphere during the jury's deliberations such that he did not receive a fair trial. The government counters that, while the term "La Cosa Nostra" does appear frequently in the indictment, that term is the name of the enterprise and substantial evidence was presented to that effect. In

addition, the government points out that the other terms about which Porter complains were only used to clarify what "La Cosa Nostra" means. The government argues, finally, that the indictment is exceedingly long, and it would have been difficult for the jury to conduct any deliberations without it.

Our review of the indictment shows that after defining the enterprise as discussed above, the indictment refers to the enterprise as "the Pittsburgh LCN" almost universally. In addition, the judge specifically charged the jury that the indictment contained only charges and was not evidence. With these observations in mind, we conclude that the district court did not abuse its discretion in sending this indictment to the jury.

Porter also contends that once the district judge concluded that the

indictment should go to the jury, he should have permitted Porter's answer to go to the jury room. Porter has cited no case where such a procedure was followed, nor have we uncovered such a case. Indeed, there is no provision in the Federal Rules of Criminal Procedure for answers to indictments.[6] The district court did not abuse its discretion in making this decision.

IV. SINGLE CONSPIRACY v. MULTIPLE CONSPIRACIES

The next issue is raised by Raucci and Levie: Whether the district court

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[6] Rule 12(as) provides:

> Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided by these rules.

impermissibly permitted a variance between the conspiracy charge in the indictment and the proof at trial by instructing the jury with regard to a single drug conspiracy in Count 3 when the evidence at trial showed multiple conspiracies. The question of whether there was one or more conspiracies is a question of fact. We review the evidence in the light most favorable to the government to determine whether it supports the jury's finding of a single conspiracy. United States v. DiPasquale, 740 F.2d 1282, 1292 (3d Cir. 1984); cert. denied, 469 U.S. 1228 (1985).

A large body of case law on this issue has evolved from Kotteakos v. United States, 328 U.S. 750 (1946). In Kotteakos, the Court held that, when the government alleges a single conspiracy in the indictment, proof of multiple

conspiracies at trial is an impermissible variance. In United States v. Camiel, 689 F.2d 31, 35 (3d Cir. 1982), we interpreted Kotteakos as creating a two-pronged test for analyzing these situations: "(1) there must be a variance between the indictment and the proof, and (2) the variance must prejudice some substantial right of the defendant."

The first prong of this test involves examining the record to determine whether the jury was justified in concluding that a unitary conspiracy existed. In United States v. Smith, 789 F.2d 196, 200 (3d Cir. 1986), we noted that "a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." In United States v. Kelly, 892 F.2d 255 (3d

Cir. 1989), where an overarching master scheme was not involved, we adopted a "three-step inquiry" to determine whether a single conspiracy or multiple conspiracies existed:

> First, we examine whether there was a common goal among the conspirators. Second, we look at the nature of the scheme to determine whether "the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators." Third, we examine the extent to which the participants overlap in the various dealings.

Id. at 259 (citations omitted).

The parties primarily argue over the Kelly factors articulated above. Nevertheless, the facts of this case are better analyzed under the reasoning of Smith. There, as already noted, the court held that no variance occurred if the evidence supported a finding of a master conspiracy with several sub-schemes. Under Smith, we are required

to "sustain the jury's verdict if there is substantial evidence . . . to support the finding of a single master conspiracy with subsidiary schemes." Smith, 789 F.2d at 200, and there is clearly sufficient evidence in this record to support the jury's verdict on this theory.

At trial the government produced substantial evidence of the existence of the LCN on a national and local basis. It also demonstrated how each of the defendants was connected to the Pittsburgh LCN. While it may be true that the drug sub-schemes involved in this case would be insufficient to support a single conspiracy count on their own, the evidence is sufficient when the master conspiracy is kept in mind.

If there is no variance between the indictment and the proof at trial, i.e.,

one conspiracy was proved rather than multiple conspiracies, we need not reach the second prong established in Camiel--prejudice to the defendants.

V. RICO CONSPIRACY

Appellants Sosa, Levie, Durish, and William Porter claim that there was insufficient evidence in the record to support the jury's finding of agreement with regard to the RICO conspiracy count. The section of RICO dealing with conspiracy is 18 U.S.C. § 1962(d).[7]

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[7] Section 1962)(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (1) (b), or (c) of this section.

The defendants were charged with conspiring to violate subsection (c) which provides:

> It shall be unlawful for any person employed by or associated with any (continued...)

This section makes it unlawful to conspire to violate the substantive provisions of RICO. In United States v. Riccobene, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983), we established the requirements for conviction under this section. We stated that to prove agreement, the government must show that, "each participant knowingly associated himself with the larger enterprise." Id. at 224. Because an agreement to violate the substantive provisions of RICO is necessary, an

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[7](...continued)
enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The enterprise charged by the government is the Pittsburgh LCN.

agreement to commit the predicate offenses is not enough. Nor is mere participation in the same enterprise sufficient. The government is required to prove that the defendants "understood the scope of the enterprise and knowingly agreed to further its affairs through the commission of various offenses." Id. at 225. This does not mean that in proving a RICO conspiracy, proof that a defendant committed certain predicate offenses is irrelevant. As in traditional conspiracy cases, "[p]roof of agreement in a RICO proceeding may be established by circumstantial evidence." Id. Therefore, proof that a defendant committed a certain predicate act is circumstantial evidence that that defendant agreed to further the affairs of the enterprise.

A. Sosa

Sosa was the Florida drug

connection of the Porter group. From the outset of that group's dealings with Sosa, he was an intended rip-off target. Sosa argues that there is no evidence that he was aware of the scope of the enterprise with which he was dealing. In addition, he argues that because he was the intended target of the enterprise, it is inconsistent to conclude that he knowingly agreed to further its interests. The government counters that Sosa must have known of the scope of the enterprise because Chiarelli and Durish personally introduced him to Rosa, who was to be Sosa's contact with the Pittsburgh LCN. The government further argues that Sosa knew that he was dealing with a highly organized structure because of the large quantities of cocaine that Rosa purchased from him over the course of approximately one year. In addition, when Rosa ripped-off

Sosa by packaging $100,000 to look like $400,000, Chiarelli and Porter knew about the swindle almost immediately. Rosa testified that Sosa contacted Chiarelli who informed Porter of the rip-off. App. at 2401. Rosa was subsequently called to Porter's home and made to account for the proceeds. The government contends that the inference from this circumstantial evidence is clear; Sosa knew that Chiarelli, Porter, Durish, and Rosa were associated with a very large, sophisticated enterprise and made use of its dispute resolution mechanism by calling Rosa's superiors to settle his grievance.

In light of the deferential standard of review, we will uphold Sosa's RICO conspiracy conviction. While the fact that members of the enterprise introduced Sosa to Rosa is not alone very probative on the issue of

Sosa's awareness of the scope of the enterprise, the jury could have reasonably inferred such awareness from that fact, the fact that such large amounts of cocaine were purchased by Rosa, and the fact that Sosa contacted Chiarelli and Porter almost immediately after the rip-off.

Assuming, as we think we must based upon the record evidence and the jury's verdict, that Sosa was aware of the nature of the enterprise, his commission of the predicate acts is strong circumstantial evidence of his agreement to further the affairs of the enterprise through criminal activity. Sosa was convicted of several cocaine distribution counts in addition to the RICO counts. The fact that he sold somewhere around 100 kilograms of cocaine to a member of the enterprise leads logically to the conclusion that he agreed to

further the enterprise's affairs through the "commission of various offenses."

B. Levie

Levie's argument is along the same line as Sosa's. He claims that he only had contact with a limited number of the members of the enterprise and had no knowledge of the size or scope of the enterprise. While he admits making the drug sales, he characterizes these sales as "sporadic cocaine sales. . . over a three year period." Levie's Br. at 13. There is evidence, however, that Levie was also aware of the scope of the enterprise. He was introduced to Rosa by Raucci, an underboss in the Pittsburgh LCN. In addition, Rosa testified that Raucci kept Levie "wrapped up so tight, that Bud [Levie] would listen to him." Raucci attempted to keep Levie and Levie's supply of drugs to himself by co-owning the

trailer Levie lived in and preventing him from having a phone. Raucci contacted Levie through a beeper. Levie would then go to a pay phone and make arrangements to meet his buyer. Again, the government argues that this circumstantial evidence supports the jury's finding that Levie was aware of the nature of the enterprise and agreed to further its activities. We agree; the evidence is not so lacking that the jury was unreasonable in drawing this inference.

C. Durish

Durish argues that the only evidence presented at trial was that he agreed to participate in the initial Rosa/Sosa deal when Chiarelli, Porter, Rosa and Durish went to Florida to initiate this drug connection. Citing United States v. Carter, 721 F.2d 1514 (11th Cir.), cert. denied, 469 U.S. 819

(1984). Durish argues that the government must prove that he personally agreed to commit two predicate acts. He claims that the government charged that he was part of a RICO conspiracy to commit a single crime, i.e., a conspiracy to obtain drugs on the weekend of April 8, 1985. Because the only racketeering acts that the jury found proved against him were the drug conspiracy and the substantive drug offense arising out of this one incident, he argues that the government's case against him fails for lack of a pattern.

While it is true that the only racketeering activity that the jury found that Durish personally participated in was the one weekend drug sale, the agreement to engage in that one transaction is not the drug conspiracy

that the government charged.[8] The government has alleged a multiple objective conspiracy of which this one weekend transaction is only a part. Where the government's case is so framed, we read Carter and the other relevant case law to require only a showing that the enterprise was engaged in a pattern of racketeering activity,

---

[8] The indictment charged:

> From in or around the year 1977 and continuing thereafter until in or around January 1990, in the Western District of Pennsylvania, in the state of Florida and elsewhere, the defendants, CHARLES J. PORTER, LOUIS F. RAUCCI, SR., GENO CHIARELLI, ANTHONY DURISH, a/k/a Sonny, WILLIAM R. PORTER, MICHAEL ROSENFELD AND JOHN CARRABBA, JR., did knowingly, intentionally and unlawfully conspire together and with persons both known and unknown to the grand jury to possess with the intent to distribute in excess of five kilograms of cocaine, a Schedule II narcotic drug controlled substance, contrary to the provisions of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(ii).

that the defendant knew of this activity and that he agreed to further the affairs of the enterprise. Personal participation in two predicate acts is not required.

This does not end the matter, however. The issue remains as to whether the record supports a finding that Durish knew about the affairs of LCN and agreed to participate in furthering those affairs. The issue is a close one, but we conclude that the government has the stronger position.

The evidence showed that Chiarelli and Durish knew one another well and were partners in crime. They conspired, for example, to fence stolen, antique weapons. In addition to the closeness of their relationship, there was evidence suggesting that Chiarelli, when around those he trusted, bragged on occasion about his criminal activities.

While this without more would be insufficient, in our judgment, to support an inference that Durish knew about the affairs of the LCN, the government is able to point to two, considerably more probative facts. First, Rosa testified that when the plan to rip-off Sosa with counterfeit money was hatched at a meeting in Charles Porter's home, Durish was named as one to share in the proceeds of the rip-off. Second, Chiarelli told Rosa that Durish would go with him to Florida to get the cocaine if Chiarelli could not go: in other words, he "could trust Sonny Durish." App. at 2333, 2334.

Thus, Durish had not only the friendship and trust of Chiarelli, evidence indicated that the leadership of the LCN had confidence in him. It called on him to participate in one of its most important activities and con-

sidered his contributions to its activities worth a "piece of the action" in the Sosa matter. Finally, it is quite likely that the jury appropriately inferred from Durish's presence during the April 1985 trip that he knew Chiarelli was purchasing three kilograms of cocaine and that this was expected to be only the first purchase of many.

Based upon all of this evidence we believe the jury could properly conclude that Durish was familiar with the affairs of the LCN. Moreover, having so concluded, we believe a reasonable jury could find that his participation in the April 1985 purchase demonstrated his commitment to the success of the enterprise.

D. William Porter

William Porter does not argue that he was unaware of the nature and scope of the enterprise. Clearly, there was

sufficient evidence in the record for the jury to have rationally concluded that he had such knowledge. In essence, Porter argues that he has been convicted of RICO conspiracy based upon his mere association with members of the Pittsburgh LCN. Porter was indicted and convicted of intimidating and retaliating against an informant who had given testimony to officials regarding LCN activities. The LCN allegedly obtained the identity of the informant through the Wymard/Carrabba leak in the FBI organized crime unit. These acts by Porter are circumstantial evidence of an agreement to preserve and promote the enterprise and are sufficient to justify the jury's inference of such an agreement

VI. SUBSTANTIVE RICO COUNT

Appellants Levie, Durish and William Porter also contend that there

is not sufficient evidence in the record to support the jury's finding that the individual defendants engaged in a pattern of racketeering activity with regard to the substantive RICO count (Count 2).

In order to violate 18 U.S.C. § 1962(c), a defendant must "conduct or participate . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." We have held that one conducts the affairs of an enterprise through a pattern of racketeering activity or participates in such conduct when:

> "(1) One is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise; or
>
> (2) the predicate offenses are related to the activities of that enterprise."

[I]t is only when the predicate acts are unrelated to the enter-

> prise or the actor's association with it that the nexus element is missing, and consequently there is no RICO violation.

United States v. Provenzano, 688 F.2d 194, 20 (3d Cir.) (quoting United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980)), cert. denied, 459 U.S. 1071 (1982).

There is also a significant body of case law dealing with the definition of "pattern of racketeering activity." The statutory definition of "pattern of racketeering activity" is merely that it "requires at least two acts of racketeering activity . . ." 18 U.S.C. § 1961(5). The Supreme Court has, of course, expanded upon this definition and held that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of

continued criminal activity." H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989). This requirement has generally been referred to as the "continuity plus relationship" definition of pattern.

This court most recently addressed the issue in United States v. Eufrasio, 935 F.2d 553 (3d Cir.), cert. denied, 112 S. Ct. 340 (1991). There we read the pattern requirement in organized crime cases very loosely:

> {W]e hold that when a proven organized crime entity . . . is the relevant enterprise in a RICO case, the relationship prong of RICO's pattern requirement is satisfied by functionally unrelated predicate acts and offenses, if the predicates are undertaken in association with, or in furtherance of criminal purposes of the same organized crime enterprise.

Id. at 565. Although the continuity prong of the pattern test was not in issue in Eufrasio, the court, citing H.J. Inc., noted that the continuity

requirement is met if the predicate acts "continued over a substantial period of time, posed a threat of continuing criminal activity, or were part of 'an ongoing entity's regular way of doing business.'" Id. at 564 n. 15. Because Eufrasio also dealt with an organized crime family and the government had proved that engaging in criminal conduct was that organization's regular way of doing business, the court held that the continuity requirement was easily met. Relying on this case law, the individual defendants in the current case argue that the evidence was insufficient for the jury to include that they participated in the conduct of an enterprise through a pattern of racketeering activity.

A. Levie

Levie argues that two of the three racketeering acts that the jury found

him to have committed had nothing to do with the enterprise. After his initial sale to Raucci and Rosa, Levie was found to have made two other sales to Rosa behind Raucci's back. Levie argues that because these deals with Rosa were at cross-purposes with one of the leaders of the enterprise, i.e., Raucci did not get his cut, the deals were not related to the enterprise. This is essentially an argument that Levie did not conduct the affairs of an enterprise through a pattern of racketeering activity or participate in such conduct. Levie cannot argue that his behavior did not constitute a pattern. There were at least three sales of large quantities of drugs over a three year period. In light of Eufrasio, this satisfies the continuity plus relationship test.

Nevertheless, Levie argues that under Provenzano he did not "conduct" or

"participate" because the predicate acts were unrelated to the enterprise. The gist of the holding in Provenzano is that the enterprise need not benefit from the illegal acts as long as the acts are related to the enterprise or are related to "the actor's association with it." Provenzano, 688 F.2d at 200 (emphasis added). While it may be true that the Pittsburgh LCN did not directly benefit from the drug transactions that took place solely between Rosa and Levie, the predicate offenses were related to the activities of the enterprise. It is only through association of Rosa and Levie with the Pittsburgh LCN that they were in a position to consummate the drug deals. We conclude that there was sufficient evidence in the record to support the jury's finding that Levie's drug transactions were sufficiently related to the enterprise

to support RICO liability.

B. Durish

Durish was implicated in three racketeering acts in the indictment, conspiracy to distribute cocaine (Racketeering Act III and Count 3), cocaine distribution (Racketeering Act XIV and Count 6), and extortion (Racketeering Act IX). The jury found the drug related acts proved, found the extortion act not proved, and convicted Durish of the substantive drug crime, drug conspiracy, RICO, and RICO conspiracy.

Durish's argument relates to the pattern requirement as discussed above. The offenses committed clearly are related to the enterprise; therefore, that aspect of the inquiry is not in issue. The essence of Durish's pattern argument is that the government failed to prove continuity. The continuity requirement was discussed in great

detail in H.J. Inc. In order for the government to prevail in this argument, it must prove one of two things: 1) a closed-ended period of conduct involving a series of related predicates over a substantial period, or 2) predicate acts covering only a short period of time while demonstrating a threat of continuity. H.J. Inc., 492 U.S. at 242-42. In discussing this threat, the court held, "the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." Id. at 242-43. As discussed above, the government presented evidence at trial demonstrating that Durish was part of a long term association that exists for criminal purposes. Therefore, the government's proof of pattern does not fail on the

continuity aspect of "pattern."

Durish also argues, however, that under the reasoning of United States v. Kragness, 830 F.2d 842 (8th Cir. 1987), the government has failed to prove that he committed two predicate acts. Kragness presented the issue of whether unitary conduct that violates two separate statutes can be enough to satisfy the pattern requirement that the defendant commit at least two racketeering acts. See also United States v. Walgren, 885 F.2d 1417, 1425-26 (9th Cir. 1989) (same). The defendants in Kragness were convicted of a substantive RICO violation based upon their importation and possession of the same load of marijuana. The Court of Appeals for the Eighth Circuit reversed the district court and held that "it is not proper under RICO to charge two predicate acts where one action violates two statutes."

Id. at 861. Other courts of appeals have reached a contrary conclusion. See, e.g., United States v. Gonzalez, 921 F.2d 1530, 1544-45 (11th Cir.) (upholding RICO conviction based upon importation of illegal drugs and travelling interstate for unlawful purposes), cert. denied, 112 S.Ct. 96, 178 (1991); United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) ("if distinct statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose."), cert. denied, 474 U.S. 1100 (1986).

We find it unnecessary to choose sides in this dispute, which has yet to be addressed by this court, because the current facts are distinguishable. We are not faced with a situation where Durish's single act violated two

statutes. The government charged him 1) with participating in an illegal drug conspiracy that existed between 1977 and 1990 and 2) with possessing cocaine with the intent to distribute on April 8, 1985. These acts are separate, and do not raise the issue decided in Kragness or Gonzalez. See United States v. Licavoli, 725 F.2d 1040, 1046-47 (6th Cir.); cert. denied, 467 U.S. 1252 (1984).

In sum, we conclude that the government presented sufficient evidence that Durish committed two separate predicate acts. As a result, Durish's conviction under RICO does not fail for want of proof of a pattern of racketeering activity.

C. William Porter

William Porter was implicated in three racketeering acts that the jury

found proved.[9] These included obstruction of justice, retaliating against a witness, and attempt to possess with intent to distribute cocaine. Porter also argues that the government has failed to prove a pattern to support his conviction for a substantive RICO violation.

Porter's first argument is that the attempt to possess charge is functionally unrelated to the witness tampering charges and therefore cannot be included in deciding whether he participated in a pattern of racketeering activity. If we assume that the attempt to possess was undertaken in furtherance of the enterprise, then the language regarding relatedness in Eufrasio cuts against

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[9] Porter was also named in three other racketeering acts, two of which the jury found not proved, one of which was dismissed. See Addendum to Govt. Br.

this argument. In Eufrasio, the court held that seemingly unrelated predicate acts can constitute a pattern if undertaken in association with, or in furtherance of the criminal purpose" of the enterprise. Eufrasio, 935 F.2d at 565. While there is some question whether the attempt to possess cocaine was undertaken in furtherance of the criminal purpose of the Pittsburgh LCN, we need not reach this issue in light of the two other predicate acts proved against Porter.

The other acts alleged against Porter involve two separate acts of tampering with or retaliation against a government informant. In light of the evidence presented at trial regarding the FBI leak to the LCN, the jury could have reasonably concluded that these actions were taken in furtherance of the enterprise's criminal purpose. Because

Porter engaged in at least two racketeering acts that were related to the criminal purpose of the enterprise, his RICO conviction does not fail for lack of a pattern. Porter's RICO conviction will be affirmed.

VII. STATUTE OF LIMITATIONS

Chiarelli argues that the district court erred in concluding that the statute of limitations was tolled upon the filing of a sealed indictment. Our review of this issue is plenary.

Count 6 of the government's second superseding indictment, charged Chiarelli with illegal cocaine distribution that allegedly occurred on April 8, 1985. Unless tolled, the statute of limitations for this offense would have run on April 7, 1990. 18 U.S.C. § 3282. The original indictment was returned on February 16, 1990. It did not include the cocaine distribution charge in

question. The first superseding indictment was filed on April 4, 1990. This indictment did contain the charge in question. The second superseding indictment was filed April 18, 1990. Count 6 of that indictment was identical to a count contained in the first superseding indictment. All of these indictments were sealed upon motion of the government. On April 19, 1990, upon arrest of all the defendants, the second superseding indictment was unsealed.

Chiarelli essentially has two arguments regarding the timeliness of the indictment. First, he claims that the second superseding indictment was barred by the statute of limitations because it was filed after April 7, 1990. Second, even if the first argument fails, Chiarelli maintains that the statute of limitations bars his prosecution because the indictment was

unsealed after the limitations period had run. Neither of these contentions has merit.

In United States v. Friedman, 649 F.2d 199 (3d Cir. 1981), we decided Chiarelli's first argument against him. In that case we held that:

> Once an indictment is brought, the statute of limitations is tolled as to the charges in that indictment. . . . Since the statute stops running with the bringing of the first indictment, a superseding indictment brought at any time while the first indictment is still validly pending, if and only if it does not broaden the charges made in the first indictment, cannot be barred by the statute of limitations.

Id. at 203 (quoting United States v. Grady, 544 F.2d 598 (2d Cir. 1976)). In the current case, the charge brought in the first superseding indictment on April 4 tolled the statute of limitations. Because Count 6 in the second superseding indictment is identical to

the corresponding charge in the first superseding indictment, it did not broaden the charges. Therefore, the charge brought in Count 6 is timely.

Chiarelli's second argument is equally without merit. While some cases have held that indictments held under seal beyond the limitations period are time barred, these decisions were based upon conclusions that the defendants suffered actual prejudice as a result of the delay. United States v. Edwards, 777 F.2d 644, 649 (11th Cir. 1985) ("Courts have dismissed indictments maintained under seal beyond the limitation period only upon a showing of substantial, irreparable, actual prejudice to the defendants."). cert. denied, 475 U.S. 1132 (1986). In addition, "[w]here the prosecution can demonstrate that the decision to keep an indictment secret is informed by the

exercise of sound discretion in the public interest, the date of return, rather than the date of unsealing, will establish the time the indictment is 'found.'" United States v. Srulowitz, 819 F.2d 37, 40 (2d Cir.), cert. denied, 484 U.S. 853 (1987). Chiarelli argues that the government has not shown any prosecutorial need for sealing. However, the government did aver that the grand jury investigation was ongoing and that disclosure of the indictment could cause the flight of the targets of the investigation.

We conclude that the district court did not abuse its discretion by granting the government's request to seal under these circumstances. However, even if the ongoing investigation and the risk of flight were insufficient justifications for sealing this indictment, Chiarelli has made no assertion whatso-

ever that he was prejudiced by the 15-day delay between the return of the first superseding indictment and the unsealing of the second superseding indictment. The district court did not err in refusing to dismiss this count.

VIII. CONCLUSION

Based on the preceding discussion, all of the judgments of conviction and sentence entered in the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Walter K. Stapleton
Circuit Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3049, 91-3056, 91-3058, 91-3062,
91-3063, 92-3064 and 91-3065

UNITED STATES OF AMERICA
vs.
CHARLES J. PORTER
LOUIS F. RAUCCI, SR.
GENO CHIARELLI
ANTHONY W. DURISH, a/k/a Sonny
WILLIAM R. PORTER
IRWIN LEVIE, a/k/a Buddy
RAMON SOSA
MICHAEL S. ROSENFELD
ROBERT S. LISCIO
JOHN CARRABBA, JR.
MEYER SIGAL
ROCCO VIOLA, JR>
MICHAEL TEDESCO
CHRISTOPHER PAUL HANKISH
FREDERICK J. GAULTIERI, JR., a/k/a Ricky

Louis F. Raucci, Sr.,
Appellant in No. 91-3049

Charles J. Porter,
Appellant in No. 91-3056

Irwin Levie,
Appellant in No. 91-3058

Geno Chiarelli,
Appellant in No. 91-3062

Anthony Durish,
Appellant in No. 91-3063

William R. Porter
Appellant in No. 91-3064

Ramon Sosa,
Appellant in No. 91-3065

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 91-3049, 91-3056, 91-3058, 91-3062,
91-3063, 92-3064 and 91-3065

UNITED STATES OF AMERICA
vs.
CHARLES J. PORTER
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WILLIAM R. PORTER
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Louis F. Raucci, Sr.,
Appellant in No. 91-3049

Charles J. Porter,
Appellant in No. 91-3056

Irwin Levie,
Appellant in No. 91-3058

Geno Chiarelli,
Appellant in No. 91-3062

Anthony Durish,
Appellant in No. 91-3063

William R. Porter
Appellant in No. 91-3064

Ramon Sosa,
Appellant in No. 91-3065

BEFORE: STAPLETON, SCIRICA, and ROTH,
Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States DistrictCourt for the Western District of Pennsylvania and was argued on October 18, 1991

On consideration whereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the district court be and the same is hereby affirmed.

ATTEST:

s/ Sally Mrvos

Dated: Apr. 27 1992

Certified as a true copy and issued in lieu of a formal mandate in Nos. 91-3056, 91-3058 & 91-3062 only.
Attest: /s/ Sally Mrvos
Clerk, U.S. Court of Appeals for the Third Circuit

SUPREME COURT, U.S.
FILED
SEP 17 1992
OFFICE OF THE CLERK

Nos. 92-141, 92-5280, 92-5314, 92-5367, and 92-5368

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES J. PORTER, PETITIONER
v.
UNITED STATES OF AMERICA

GENO CHIARELLI, PETITIONER
v.
UNITED STATES OF AMERICA

ANTHONY DURISH, PETITIONER
v.
UNITED STATES OF AMERICA

LOUIS RAUCCI, PETITIONER
v.
UNITED STATES OF AMERICA

WILLIAM R. PORTER, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to allow petitioner Charles Porter to call a witness whose testimony would have impeached the credibility of an individual who did not testify at trial, but whose declarations were introduced at trial through the testimony of a co-conspirator.

2. Whether the prosecutor made an improper argument to the jury or asked questions that were beyond the proper scope of the cross-examination of petitioner Charles Porter.

3. Whether the district court erred by giving the jury a copy of the indictment, but refusing to give the jury a copy of petitioner Charles Porter's "answer" to the indictment.

4. Whether the district court erred by refusing to sever certain co-defendants and grant them use immunity so that they might provide testimony for petitioner Charles Porter.

5. Whether the presentation to the grand jury of an indictment already signed by the United States Attorney violated petitioners' right to indictment by a grand jury.

6. Whether allegedly inconsistent verdicts relating to petitioner Chiarelli require setting aside the guilty verdict on one of the counts.

7. Whether the district court erred in allowing petitioner Charles Porter to testify in his own defense under restrictions on the scope of cross-examination by the United States and by other petitioners.

8. Whether the two racketeering acts that were the basis of petitioner Durish's racketeering convictions constituted a pattern of racketeering activity.

9. Whether the evidence proved several conspiracies rather than one conspiracy and thus varied impermissibly from the allegations in the indictment with respect to petitioner Raucci.

10. Whether the district court erred by not severing the trials of petitioners Raucci and William Porter.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-141

CHARLES J. PORTER, PETITIONER
v.
UNITED STATES OF AMERICA

No. 92-5280

GENO CHIARELLI, PETITIONER
v.
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No. 92-5314

ANTHONY DURISH, PETITIONER
v.
UNITED STATES OF AMERICA

No. 92-5367

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v.
UNITED STATES OF AMERICA

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WILLIAM R. PORTER, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-64a[1]) is unpublished, but the judgment is noted at 961 F.2d 1569 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 62a-64a) was entered on April 27, 1992. Petitions for rehearing were denied on June 5, 1992. The petitions for a writ of certiorari were filed on July 22, 1992 (No. 92-141), July 24, 1992 (No. 92-5280), and on July 27, 1992 (Nos. 92-5314, 92-5367, and 92-5368). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves charges that petitioners were involved in three courses of criminal conduct, all of which arose out of the activities of the Pittsburgh arm of the Mafia or La Cosa Nostra (LCN). See Pet. App. 2a, 4a-5a.

In the first course of criminality, petitioner Raucci, an underboss in the Pittsburgh LCN, introduced Joey Rosa, a future government witness, to Bud Levie, Raucci's Florida cocaine connection. Raucci and Rosa flew to

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[1] "Pet. App." refers to the appendix to the petition in No. 92-141.

Florida to meet Levie and to purchase two kilograms of cocaine. Rosa bought the cocaine from Levie and later resold it. For brokering the deal, Raucci took a $5,000 cut from Rosa's take. That arrangement continued for several transactions, but Rosa then began to deal with Levie behind Raucci's back in order to keep more of the profits for himself. See Pet. App. 5a-6a.

The second course of criminality involved Rosa's use of petitioner Charles Porter (another underboss in the Pittsburgh LCN) as an intermediary to facilitate drug purchases. Rosa attended a meeting at Porter's house where a deal was discussed involving Ramon Sosa, Porter's Florida cocaine connection. At the meeting, Porter and petitioner Chiarelli informed Rosa that they planned to do business with Sosa for a period of time and then defraud him by paying for an especially large quantity of drugs with counterfeit money. They anticipated splitting the profits among Porter, Chiarelli, Rosa, and petitioner Durish. All four went to Florida to purchase three kilograms of cocaine from Sosa. Following that initial purchase, Rosa made approximately 20 other drug buys from Sosa, in quantities ranging from three to ten kilograms. Before the group consummated its plan to defraud Sosa, however, Rosa personally defrauded Sosa by buying 15 kilograms of cocaine for $400,000, but giving Sosa only $100,000. Porter and Chiarelli learned of Rosa's scam shortly thereafter and demanded a share of the proceeds. See Pet. App. 6a-7a.

The third course of criminality involved the activities of petitioner William Porter, Charles Porter's younger brother. Evidence showed that William Porter negotiated with an undercover FBI agent for an unconsummated drug deal and that he intimidated a government witness who had provided the FBI with information about LCN activities. See Pet. App. 7a-8a.

2. After a jury trial in the United States District Court for the Western District of Pennsylvania, all five petitioners were convicted of racketeering and conspiring to commit racketeering, in violation of 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) (Counts 1 and 2); all petitioners except William Porter were convicted of conspiring to distribute narcotics and distributing narcotics, in violation of 21 U.S.C. 846 and 841(a) (Counts 3-6, 8-12, 14-17, and 20); Charles Porter was also convicted of structuring financial transactions to evade reporting requirements, in violation of 31 U.S.C. 5324(3) (Counts 23 and 24), filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 28-30), assisting in the preparation of a false tax return, in violation of 26 U.S.C. 7206(2) (Count 36), and conspiring to violate the federal tax laws, in violation of 18 U.S.C. 371 (Count 38); Raucci was also convicted of structuring a financial transaction to evade reporting requirements, in violation of 31 U.S.C. 5324(3) (Count 21) and filing false tax returns, in violation of 26 U.S.C. 7206(1) (Counts 25-27); William Porter was also convicted of attempting to distribute narcotics, in violation of 21 U.S.C. 846 (Count 12), and retaliating against a witness, in violation of 18 U.S.C. 1513(a)(2) (Count 19). The district court sentenced Charles Porter to 28 years' imprisonment, Chiarelli to 22 years' imprisonment, Durish to 17-1/2 years' imprisonment, Raucci to 27 years' imprisonment, and William Porter to 17 years' imprisonment. The court imposed five-year terms of supervised release on all the petitioners except William Porter, whose term of supervised release was only three years. See Gov't C.A. Br. 6-7 and chart.[2]

[2] Because the chart that is included as an appendix to the government's brief in the court of appeals provides a helpful summary of the counts and racketeering acts charged against each peti-

3. The court of appeals unanimously affirmed all aspects of the district court's judgment in a lengthy unpublished opinion. Pet. App. 1a-64a. The opinion addressed ten of petitioners' claims in detail (as well as several claims raised by petitioners' co-defendants), and it disposed of 12 other claims summarily, stating that those claims were "clearly without merit." *Id.* at 3a n.1.

ARGUMENT

1. Petitioner Charles Porter first claims (92-141 Pet. 16-26) that the district court erred by refusing to allow him to call a witness to impeach the credibility of Ronald Plisco. The government did not call Plisco as a witness at trial, but Marvin Droznek, one of the government's witnesses, testified to certain statements Plisco had made. Droznek's testimony was admitted under Federal Rule of Evidence 801(d)(2)(E), which permits the admission of certain statements by co-conspirators. See Gov't C.A. Br. 43-44. Porter attempted to rebut Plisco's declarations by calling an Assistant United States Attorney who, according to Porter, would have testified that Plisco had not been truthful in his cooperation with the government. See *id.* at 44. Because the Assistant United States Attorney had no knowledge regarding the truth of the declarations recounted by Droznek, the district court refused to allow Porter to call him as a witness, explaining that his testimony would "not [have been] relevant or material in this case." See *ibid.* The court made it clear, however, that Porter could call Plisco and attempt to impeach Plisco's credibility directly. Porter ultimately decided not to call Plisco. See *id.* at 45-46. The court of appeals summarily rejected

tioner, we have lodged a copy of the brief with the Clerk of the Court.

Porter's challenge to that ruling. Pet. App. 3a n.1 (claim 2).

The district court's ruling was correct. The substance of the court's ruling was that it would be inappropriate to introduce extrinsic evidence to impeach the credibility of a hearsay declarant, where the impeaching testimony would not relate directly to the issues at trial. A hearsay declarant's statements may be impeached in the same manner as the testimony of a witness. See Fed. R. Evid. 806. The Federal Rules of Evidence, however, do not permit the introduction of extrinsic evidence of specific acts to attack the credibility of a witness. See Fed. R. Evid. 608(b). It therefore was proper for the court to prohibit the introduction of such extrinsic evidence to challenge the credibility of a hearsay declarant such as Plisco. Because the court made it clear that Porter could call Plisco as a witness and impeach his credibility directly, see Fed. R. Evid. 806 (allowing a party "to examine the declarant on the [admitted hearsay] statement[s] as if under cross-examination"); Fed. R. Evid. 608(b) (allowing inquiry into specific acts of conduct on cross-examination to challenge witness's credibility), there is no reason to believe that the ruling unduly restricted Porter's ability to convince the jury that Plisco was untruthful.

2. Petitioner Charles Porter (92-141 Pet. 27-35) next claims that his convictions should be overturned because of prosecutorial misconduct.

a. Before Porter took the stand, he secured a ruling limiting the scope of the government's cross-examination to the specific events about which he testified on direct examination. During the course of the government's cross-examination of Porter, petitioner made 30 separate objections to government questions, claiming that they transgressed the bounds set by the court's ruling; the court overruled 17 of those objections, but sus-

tained 13 of them. See Gov't C.A. Br. 55-57. The district court rejected petitioner's motion for a mistrial based on the inappropriate questions, finding that the prosecutor had "a reasonable basis" for believing that the questions were permissible. See Gov't C.A. Br. 58. The court of appeals summarily rejected Porter's challenge to the prosecutor's questions on cross-examination. Pet. App. 3a n.1 (claim 4).

b. In its closing argument to the jury, the government exhorted the jury to strike a blow against the Pittsburgh LCN, stating: "With your verdict, ladies and gentlemen, you are going to do one of two things: you will either in large measure restore this family [the Pittsburgh LCN] to its former healthy state, or you will sever the head from the body of this family. * * * The people of Western Pennsylvania wait your verdict." See 92-141 Pet. 8. The court of appeals did not address Porter's claim (see C. Porter C.A. Br. 46-47; C. Porter C.A. Reply Br. 11-14) that the convictions should be reversed because of the prosecutor's closing argument.

c. Porter offers no reason to believe that the district court's rulings on those issues present a question of general legal significance. Porter testified under unusual restrictions on the scope of cross-examination, which made it unclear precisely what types of questions would be permissible. Although the district court ruled on several occasions that specific questions asked by the prosecutor exceeded the permissible scope of that restricted cross-examination, the court also found that the excluded questions had a reasonable basis. The mere asking of the questions therefore was not improper.

Similarly, the prosecutor's exhortation to the jury to strike a blow against the Pittsburgh LCN was not improper. The indictment charged, and the evidence established, that petitioner and his co-defendants were leading figures in the racketeering activities of that

organization. The closing argument of a prosecutor need not be "confined to such detached exposition as would be appropriate in a lecture," *United States* v. *Wexler*, 79 F.2d 526, 530 (2d Cir. 1935), cert. denied, 297 U.S. 703 (1936). The prosecutor's use of rhetoric in the closing argument did not deny petitioner Charles Porter a fair trial.

3. Petitioner Charles Porter next argues (92-141 Pet. 35-41) that the district court erred in allowing the indictment to be provided to the jury during its deliberations, but refusing to allow Porter's "answer" to the indictment to be provided to the jury; he further contends that the indictment's references to the Pittsburgh LCN prejudiced him.

The court of appeals properly rejected those claims. Pet. App. 21a-24a. As the court pointed out, the indictment was not improperly spiced with inflammatory references to the "mob" and "La Cosa Nostra." Rather, as the court noted, "after defining the enterprise * * *, the indictment refers to the enterprise as 'the Pittsburgh LCN' almost universally." *Id.* at 22a-23a.

The court also did not abuse its discretion by sending the indictment to the jury. The district court instructed the jury that the indictment contained only charges and was not evidence. Pet. App. 23a. In light of the length and complexity of the indictment (116 pages covering 38 counts, see *id.* at 2a), the district court quite reasonably concluded that the jury would have great difficulty in conducting its deliberations without a written copy of the charges.

Finally, the district court did not err in refusing to submit Porter's "answer" to the jury along with the indictment. Porter's plea of not guilty to every charge was explained to the jury, and Porter's counsel was permitted to present evidence and argument to the jury

explaining in more detail why Porter believed he was not guilty of the offenses charged in the indictment.

4. Petitioner Charles Porter's final argument (92-141 Pet. 41-47) is that the district court erred by refusing to grant use immunity to his co-defendants and sever their trials to enable Porter to call them as witnesses. Porter contended at trial that several of his co-defendants would have testified in his favor if their trials had been severed from his. To evaluate that contention, the trial court asked Porter to submit affidavits from the prospective witnesses stating that they would testify and summarizing their testimony. When none of the witnesses submitted such an affidavit, the district court denied Porter's request. See Pet. App. 15a-17a.

The court of appeals rejected Porter's contention that the district court erred in not granting a severance. Pet. App. 15a-19a. It relied on two grounds. First, it noted Porter's failure to submit affidavits from the witnesses substantiating his claim that they would testify if a severance were granted. *Id.* at 16a-17a.[3] Second, it noted that even if the prospective witnesses had testified, the documentary evidence and testimony presented by the government would have impeached their testimony substantially. *Id.* at 18a. As the court viewed the record, "[i]t is exceedingly unlikely that the contradictory evidence offered by Porter would have withstood cross-examination." *Ibid.* Accordingly, the court of appeals concluded that the district court did not abuse its

[3] The court noted that one of the prospective witnesses, Chiarelli, may have stated in an unsworn statement that he would have testified if granted immunity. Pet. App. 17a n.4. The court pointed out, however, that there was no prospect that the government would grant immunity to Chiarelli, who was a defendant at trial. As the court of appeals stated, petitioner has not challenged the government's unwillingness to grant immunity to Chiarelli. See *ibid.*

discretion in denying Porter's motion to sever the trials of his co-defendants. *Id.* at 18a-19a.

The court of appeals was correct. In light of Porter's failure to provide affidavits substantiating his claim that the witnesses would testify as he contended, and the court's conclusion that any such testimony would have been thoroughly undermined through cross-examination, the district court did not abuse its discretion in denying his motion to sever the trials of his co-defendants.

5. Petitioners Chiarelli (92-5280 Pet. 13-18) and Durish (92-5314 Pet. 13-18) claim that the indictment should have been dismissed because it was presented to the grand jury pre-signed by the U.S. Attorney and that the district court should have allowed them to conduct discovery regarding the effect of the signature on the grand jury's deliberative process. The court of appeals summarily rejected petitioners' challenge to that ruling. Pet. App. 3a-4a n.1 (claim 7).

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "shall be signed by the attorney for the government," but does not provide that the signature must await the grand jury's approval of the indictment. One court of appeals has suggested that pre-signing an indictment is not preferred, because of the risk that the signature might influence the grand jury and thus interfere with that jury's independent role in the institution of criminal proceedings. See *United States* v. *Singer*, 660 F.2d 1295, 1302 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982); *United States* v. *Frantze*, 655 F.2d 128, 130-131 (8th Cir. 1981). No court of appeals, however, has held that the practice is reversible error. See, *e.g.*, *United States* v. *Brown*, 684 F.2d 841, 842 (11th Cir. 1982); *United States* v. *McKenzie*, 678 F.2d 629, 632-633 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States* v. *Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972).

Whether or not a government attorney signs the indictment before presenting it to the grand jury, it is inevitable that the grand jury will understand that the prosecutor believes that probable cause exists with respect to the charges in the indictment. See *United States* v. *McKenzie*, 678 F.2d at 632. Accordingly, there is no reason to believe that the presence of a signature on an indictment would be likely to have a material effect on the deliberations of the grand jury. In light of the historic independence of the grand jury's function from that of the court and the prosecutor, the presigning of an indictment is no more a sufficient ground to dismiss an indictment than the prosecutor's failure to present evidence that might appear to exculpate the defendant. See *United States* v. *Williams*, 112 S. Ct. 1735, 1741-1746 (1992).

Even if it was inappropriate for the prosecutor to presign the indictment, any error in that regard was harmless. The final petit jury verdicts of conviction, based on evidence that proved guilt beyond a reasonable doubt, necessarily established that there was probable cause to bring the indictment. Hence, petitioners cannot complain credibly at this point that the prosecutor's signature improperly caused the grand jury to return an unfounded indictment. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255-256 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986).

6. Petitioner Chiarelli also argues (92-5280 Pet. 19-24) that his convictions for the racketeering offenses should be overturned because of an inconsistency in the jury's verdict. The court of appeals summarily rejected his challenge on that point. Pet. App. 4a n.1 (claim 8).

With respect to the racketeering conspiracy charge (Count 1), the jury found four predicate acts to have been proved against Chiarelli: a comprehensive drug conspiracy between 1977 and 1990 (racketeering act 3), two in-

stances of cocaine distribution in 1986 (racketeering acts 14, 25), and interstate transportation of stolen property (racketeering act 33). With respect to the substantive racketeering charge (Count 2), the jury found that only three of those predicate acts had been proved; it found that one of the acts of cocaine distribution (racketeering act 25) was not proved. Finally the jury acquitted Chiarelli on Count 16 of the indictment, which charged that Chiarelli had violated 21 U.S.C. 841(a)(1) by committing the same act of cocaine distribution that the jury found had not been proved as to the substantive racketeering count. See Gov't C.A. Br. App. (chart).

Contrary to Chiarelli's argument (92-5280 Pet. 23-24), this Court's decision in *United States* v. *Powell*, 469 U.S. 57 (1984), disposes of his claim. In *Powell*, this Court held that the existence of inconsistent verdicts of acquittal is not a basis for overturning verdicts of conviction. As the Court explained,

> inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Id. at 65. Hence, the proper rule "is simply to insulate jury verdicts from review on this ground." *Id.* at 69. Chiarelli's argument (92-5280 Pet. 24 (emphasis omitted)) that the verdicts in this case are "contradictory," rather than "inconsistent," does not provide a sufficient

basis for rejecting the court of appeals' decision.[4] Moreover, the existence of three other racketeering acts for both of the racketeering charges—when only two are required—makes it clear that there is no possibility that any confusion affected the actual verdict entered by the district court.

7. Petitioner Chiarelli's final claim (92-5080 Pet. 25-29) is that the district court improperly restricted his cross-examination of Charles Porter, in violation of the Confrontation Clause of the Sixth Amendment. As noted above, Porter testified under a ruling by the trial court prohibiting other parties from questioning him with respect to any matter not within the scope of his direct examination. Chiarelli argues that Porter's failure to testify about the existence of the Pittsburgh LCN or whether any of the defendants were members of that enterprise left the jury with the impression that Porter tacitly was admitting the existence of the criminal enterprise, and that the trial court's unwillingness to allow Chiarelli to question Porter about those matters violated the Confrontation Clause.

The court of appeals correctly regarded that argument as meritless. Pet. App. 19a-21a. As it explained,

> Porter's testimony [wa]s no more a tacit admission of the existence of the Pittsburgh LCN than if he declined to testify altogether. * * * Porter in no way implicated himself or any of the other defendants in

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[4] Chiarelli's reliance (92-5280 Pet. 23) on *Finnegan* v. *Fountain*, 915 F.2d 817 (2d Cir. 1990), is entirely misplaced. In that case, the court of appeals held in a civil case that a judge could not enter a judgment that disregarded any material finding of the jury. Putting to one side the concerns of the criminal process that motivated the decision in *Powell*, *Finnegan* cannot support Chiarelli because the judgment in this case did not disregard any of the jury's findings.

> criminal activity. Therefore, this limitation on cross-examination did not constitute the clear and substantial prejudice resulting in a manifestly unfair trial that is necessary for reversal.

Id. at 20a. Because Porter did not testify about the Pittsburgh LCN, there was no testimony from him that Chiarelli was denied the right to confront. The district court's ruling that Chiarelli could not cross-examine Porter about matters not covered in Porter's testimony therefore did not violate the Confrontation Clause.

8. Petitioner Durish claims (92-5314 Pet. 7-12) that there is a conflict among the circuits on the question whether the "pattern" requirement of a racketeering conviction under 18 U.S.C. 1962(c) is satisfied where the only predicate acts are a substantive offense and conspiracy to commit that offense. As the court of appeals recognized, however, that claim does not accurately describe Durish's situation. See Pet. App. 36a-41a.

The jury found that the government had proved that Durish had committed two predicate acts: the comprehensive drug conspiracy between 1977 and 1990 (racketeering act 3) and an instance of cocaine distribution (racketeering act 14). See Gov't C.A. Br. App. (chart at 1, 3). As the court of appeals explained, the drug conspiracy alleged in racketeering act 3 was not simply a conspiracy to engage in the cocaine distribution alleged in racketeering act 14; it was "a multiple objective conspiracy of which this one weekend transaction is only a part." Pet. App. 37a-38a.

The court of appeals concluded that the larger conspiracy could satisfy the "pattern" requirement if the enterprise was engaged in a pattern of racketeering activity, and if Durish knew of the activity and agreed to further the affairs of the enterprise. Pet. App. 38a-39a. After reviewing the evidence, the court decided that "the jury could properly conclude that Durish was familiar

with the affairs of the LCN" and "that his participation in the April 1985 purchase demonstrated his commitment to the success of the enterprise." *Id.* at 41a. Durish does not challenge the court of appeals' conclusion that participation in an enterprise engaged in a pattern of racketeering activity can satisfy the pattern requirement; the court of appeals' fact-specific determination that Durish participated in such an enterprise does not warrant review by this Court.

9. Petitioner Raucci claims (92-5367 Pet. 6-9) that this Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), requires reversal of his conviction for conspiracy to distribute controlled substances because of a prejudicial variance between the indictment and the proof at trial.

Count 3 of the indictment alleged a single drug conspiracy consisting of multiple sub-schemes tied together as a master conspiracy by the involvement of the Pittsburgh LCN and the involvement of the co-conspirators in that enterprise. The proof at trial showed both the multiple sub-schemes and the master drug conspiracy of the Pittsburgh LCN. See Pet. App. 28a. The court of appeals correctly rejected Durish's claim, explaining that there was "substantial evidence * * * to support the finding of a single master conspiracy with subsidiary schemes." *Ibid.* It therefore concluded that "there is no variance between the indictment and the proof at trial," much less a prejudicial variance sufficient to justify reversal. *Id.* at 28a-29a.

Raucci's argument that the government failed to prove a single overarching conspiracy connecting all of petitioners' drug activities rests on the premise that "[t]he conspiracy alleged in Count Three of the Indictment was a separate drug conspiracy that had nothing to do with the La Cosa Nostra." 92-5367 Pet. 8-9. The court of appeals, however, correctly ruled that the proof at trial ad-

equately established that the Pittsburgh LCN was involved in the conspiracy. That fact-specific ruling does not, in any event, present a question suitable for this Court's review. *E.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).[5]

10. Finally, petitioners Raucci (92-5367 Pet. 9-13) and William Porter (92-5368 Pet. 4-6) argue that the district court erred in refusing to sever their cases for separate trials.

a. Raucci argues that counsel for Charles Porter was so ineffective that the district court should have granted Raucci a severance to relieve him of the prejudice he suffered from the ineffective representation. 92-5367 Pet. 9-13. The court of appeals concluded, however, that Raucci "suffered no prejudice as a result of the joinder." Pet. App. 21a n.5. Raucci offers no reason to believe that the fact-specific determination of the court of appeals on that score presents a legal question of general significance.[6]

b. William Porter argues that he was prejudiced by the joint trial, because he was a relatively minor player in the conspiracy and there was a substantial chance that evidence against his brother Charles Porter would be incorrectly held against him. 92-5368 Pet. 4-6. The court of appeals properly rejected that claim, pointing out that William Porter was acquitted of all the counts

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[5] Raucci's claim (92-5367 Pet. 8-9) that the government "has [n]ever contended that there was a master scheme as it related to Count Three involving the La Cosa Nostra" is demonstrably false. See Gov't C.A. Br. 60 (referring to "LCN involvement throughout the entire period" of the conspiracy in Count 3).

[6] Raucci does not contend "that the situation at trial involved antagonistic or irreconcilable defenses," see 92-5367 Pet. 9-10, so the petition need not be held for *Zafiro* v. *United States*, No. 91-6824, which presents the question whether the existence of inconsistent defenses is a sufficient basis for severance.

in which both he and his brother were charged. Pet. App. 14a-15a. Accordingly, the court concluded: "It is clear that the jury did compartmentalize the evidence and that William Porter was not prejudiced by being tried with his brother." *Id.* at 15a. William Porter presents no reason to believe that the court of appeals' evaluation of the record on that point presents a legal question meriting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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